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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether Respondents have misrepresented the issues which this court is being asked to review.

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PETITIONERS' REPLY BRIEF

REASONS FOR GRANTING THE WRIT

1. The Petition addresses critical issues of law; i.e., the definition of free appropriate public education under the Act.

Certiorari should be granted. The issues presented to this Court are not, as Respondents allege, merely issues of fact, but critical questions of statutory construction which have direct and immediate effect throughout the State of New York, and the nation; and involve whether the District Court had the power to formulate a definition of "free, appropriate public education" under the Education of All Handicapped Children Act of 1975, 20 U.S.C. 1401 et seq. ["Act"], and if it did, whether its definition is proper.

The Petitioners have asked this Court to review whether the Court of Appeals, in affirming the District Court's decision, has created an unworkable defini-

tion of free appropriate public education, whether it has approved an improper and unworkable test for compliance with that definition, and whether it has condoned judicial disregard for the roles of the Federal Commissioner and the State Educational Agency as delineated by the Act.

While it is possible to construe the goal of the Act as the provision of equal educational opportunities to all children, the District Court transmuted that goal into a definition. That definition, and the test for conformity to it, create an unworkable scheme, which is already being cited with approval by other Courts (see Petition, P. 18-19). The fact that the decision of the District Court was affirmed by the Court of Appeals gives the scheme additional precedential value.

The District Court mistakenly held

that the Act contained no definition, thereby freeing it to define "appropriate education" to mean:

> that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. (A-C 10). 483 F.Supp. 528, 534.

The Court went on to state that this definition requires:

> that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children. (A-C 13-14). 483 F.Supp. 528, 535.

This judicially created method for evaluation of the appropriateness of the education provided to the handicapped demands measurements of "potential" and "shortfall" which are impossible to implement.

The definition and its required test

fail to provide guidance to local and state educational agencies. There is no feasible method by which an educational institution can measure the "shortfall" from full potential for either handicapped or non-handicapped pupils. There are no tests at present which measure "shortfall", and it is not clear from the District Court's opinion how it derived that term. While there is a wide body of scientific and educational knowledge on the subject of academic testing, there appears to be no accepted method for making the measurements required by the Court.

The Court took no testimony, and it did not cite any evidence in its opinion, which would demonstrate that it was necessary to create a test to measure "shortfall" in order to implement the Act. The Court's struggle to formulate a working

definition and test arose from its failure to realize that the Act provides a definition. See U.S.C. 1401 (18).

The District Court's definition enlarges the scope of judicial review in a manner never contemplated under the Act. It places upon the state and federal courts the burden of determining whether in each case the state or local educational agency has measured the shortfall from potential of all handicapped and non-handicapped children in a given population, whether the tests are appropriate measures of that shortfall, and whether the shortfall of the handicapped children from their potential is greater than that of their non-handicapped peers, all before reaching a decision in any case brought under the Act.

2. The Court erred in basing its decision on the needs of a class, rather than on the individual needs of a handicapped pupil.

The District Court formulated its decision post trial, despite the Petitioner School District's motion to dismiss on the ground, among others, that it was in compliance with the Act. Since the testimony taken by the District Court did not address itself to the definition and tests enunciated in its opinion, the court could not apply its definition and tests to the evidence. Instead, it based its decision to provide the student with a sign language interpreter on testimony that all deaf students receive some benefit from sign language interpreters. That result contradicts the explicit provision of the Act, 20 U.S.C. 1401(16), which mandates that special education shall be designed to meet the unique in-

dividual needs of each handicapped child.

If the Court's decision is allowed to stand, educational determinations over the needs of handicapped children will be based on needs common to a class of handicapped pupils, rather than to the needs of individual children, in direct contradiction to the mandate of the Act.

The Respondents adopted a philosophical approach to their proof to butress their argument that all deaf children should receive interpretive services in school. They did not want to address the question of how well the individual student was doing without the interpreter, as it was their position that every deaf child, including their daughter, could do much better if the School District could be compelled under the Act to make the service available.

In this context it is important to

note that at the first stage of the review procedure, viz., before the independent hearing officer, the entire direct case by the Respondents, represented by counsel, consisted of eleven pages of testimony, and established four facts: 1) that the student has a form of deafness, 2) that the parents wanted a sign language interpreter in her regular second grade classroom, 3) that the parental demand reflected the opinion of a number of experts in the field of education of the deaf, and 4) that her academic and social success in the classroom were irrelevant in the absence of an interpreter. (R-A 17-28).

This approach was also used in the District Court where the Respondents presented only expert testimony, applicable to all deaf students, on the educational desirability of interpreters, except for

the disputed and contested affidavits.

The decision of the District Court required substitution of a method of education based on the perceived needs of the class "deaf students" for a method of education which was based on Amy Rowley's individual needs, which yielded successful results, and which was in conformity to the state plan.

The issue here is not whether a conflict exists between the New York State plan and the Federal statutory scheme. Petitioners do not contend that the New York State plan prohibits provision of sign language interpreters for deaf children, if a determination that such services are necessary is made by either the local educational agency,[1] an inde-

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1. The Hendrick Hudson Central School District evaluated the unique needs of Amy Rowley and developed an Individualized

pendent hearing officer, or the State Commissioner. However, the Federal Commissioner has approved New York State's plan which does not mandate that service in light of the other service provided to deaf pupils.

Petitioners are asking this Court to address the following issue. Given the mandate for provision of services designed to meet the unique needs of the individual child, and the lack of a requirement in the State plan for provi-

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Educational Program for her which included not only the services of a certified teacher of the deaf five times a week, but also the services of a speech therapist three time a week and use of an F.M. Wireless. The District utilized a sign language interpreter for a two-week period, but deemed the service unnecessary because the student ignored the interpreter, and focused her attention on her teacher, whom she could understand. (R-A, 38-41, 164-166).

sion of interpreters to all deaf children, is it the prerogative of federal courts to order provision of interpretive services solely on the basis of testimony that all deaf children would benefit from such services?

3. The District Court erred when it ignored the role of the State plan in the determination of whether the School District was providing a free appropriate public education.

Respondents allege that the Petition for the Writ of Certiorari raised the issue of allocation of costs for the first time. This is untrue. The issue was raised in the Briefs to the Court of Appeals for the Second Circuit by the Petitioner Commissioner (p.21) and the Amicus Curiae New York State School Boards Association (p. 27-28).

Under the Act, it is left to each State to allocate its limited resources as it sees fit, provided that its plan for such allocation has been approved by the Federal Commissioner. 20 U.S.C.1413

As Senator Javits noted during Senate floor debate, a balance must be drawn between:

> "budgetary constraints under which State educational systems operate, and the long-term benefits to be gained by the earliest possible services to handicapped children". (121 Cong. Rec. 37417).

If, as the Court below suggests, a district must establish that a handicapped child is learning all she could be learning if she were not handicapped, that balance is completely lost. There will be no limit to the amount and kinds of services which must be provided unless and until the court is satisfied that the particular student involved is performing up to his or her potential. All of these demands will be made in the context of current fiscal belt-tightening on the part of states, local school districts, and the public.

Education today is still primarily a state and local matter, and since the educational needs of all children are

substantial, and the costs of meeting them even greater, hard decisions must be made at the state and local level as to standards and priorities. These decisions must include what will be taught and in what context. The decision of the District Court, however, strives toward maximization of the potential of all handicapped children and mandates that all deaf children receive a certain service. Such a decision strikes at the very heart of educational decision-making at the state and local level. School districts should not be held financially accountable for the achievement of the potential of handicapped children when no such requirement exists for the non-handicapped. Variations in the maturity, abilities and family backgrounds of all children make this an impossible goal. All that should be

required is the provision of an adequate education to all children in a setting which allows them to acquire academic expertise, social skills and moral values necessary to become members of society.

Recognition of the right of handicapped children to equal protection of law should not lead to a judicial definition of the nature of the educational program for all children with a particular handicapping condition based on a blanket philosophy of educational needs, and in derogation of the federally approved State plan. To do so would shift very basic educational decision-making into a forum which the courts themselves have recognized to be inappropriate. (San Antonio Independent School District v. Rodriquez, 414 U.S. 1, 93 S.Ct. 1287, 36 L.Ed. 2d 16 (1973); Milliken v.Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed

2d 1069 [1974]; Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 226, 21 L.Ed 2d 228 [1968]).

The Act contains a specific procedure for invalidation of State plans, and court action by individuals is not a part of it. One of the functions of the Federal Commissioner is review and approval of state plans. He is empowered to invalidate such plans, and to withhold funding from states for non-compliance with the mandates of the Act. If he does so, the state is entitled to seek judicial review. 20 U.S.C. 1413, 1416.

In order to reach its definition of free appropriate public education, given the nature of the testimony, the court had to determine a fundamental legal principal under the Act, i.e., who determines what is a free appropriate public education. After it determined

that there was no definition under the Act, the court said:

> Aside from the HEW regulations quoted above, it has been left entirely to the courts and the hearing officers to give content to the requirements of an "appropriate education". (Emphasis supplied) (A-C 11) 483 F.Supp. 528, 534.

In effect, the District Court took testimony from experts on the education of deaf children, formulated its own State plan and applied it to the case before it. While arguments can be made that the court's plan was a good plan, the development of plans has been left to the states; and evaluation of whether those plans are in compliance with the Act is clearly left to the Federal Commissioner of Education, not to the individual district courts or independent hearing officers, as held by the District Court in its opinion.

CONCLUSION

Wherefore, Petitioners respectfully requests that the Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit be granted.

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